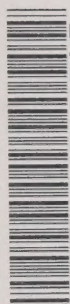


CA1 21

-638500



3 1761 11971371 7

FINAL REPORT
(annexe)

Author: J.D. Smiley
Title: ~~Public Policy and Canadian~~
~~Cooperative Federalism~~
~~Federalism Annex 1.~~
~~an evaluation~~
Revision of Chapter 8.
Div: 2
Contract No: 1 Report No: 1



Presented to the
LIBRARY *of the*
UNIVERSITY OF TORONTO

by
Mr. Royce Frith
Commissioner

Royal Commission on
Bilingualism and
Biculturalism

ACCOPRESS
GENUINE PRESSBOARD BINDER
CAT. NO. **BP 2507 EMB**

ACCO CANADIAN COMPANY LTD.
TORONTO

OGDENSBURG, N.Y., CHICAGO, LONDON

CATALOG No. 3522

CHAPTER 8.

-63 B500

COOPERATIVE FEDERALISM: AN EVALUATION.

The institutions and procedures we described in the last Chapter are evolving rapidly. Cooperative federalism is in essence a series of pragmatic and piecemeal responses by the federal and provincial governments to the circumstances of their mutual interdependence. We will try in the Chapter to evaluate this evolving system of relations in answer to three kinds of general questions.

First, what are the general preconditions of success of cooperative federalism?

Second, what are the relative possibilities of cooperative federalism and explicit constitutional reform in meeting the demands for change in the Canadian federal system?

Third, what are the possibilities of the ongoing procedures of cooperative federalism in meeting the demands of English and French Canadians and of securing the survival of the Canadian federal union?

CIRCUMSTANCES OF SUCCESS AID: PUBLIC POLICY EFFECTIVENESS.

There can be little disagreement with the general proposition that if liberal-democratic institutions are to survive they must somehow find ways of dealing with the very great number of varied and often contradictory demands made upon them, and that only by demonstrating such effectiveness can enough support be generated among the politically influential elements of democratic communities to ensure the long-run continuance of these institutions. In federal systems the

individual jurisdictions must not only learn to respond effectively to the demands upon them but must also evolve adequate means of central-regional articulation to cope with the circumstances of the interdependence of the two levels. Such articulation can take two forms:

- co-ordination, the process by which a complex of public activities is ordered according to some set of goals or priorities. Co-ordination relates both to the ranking itself and the subsequent actions to implement these decisions.

- consultation, the process by which officials and public agencies with some significant degree of both independent discretion and mutual interdependence communicate to each other their respective perceptions of situations and their judgments of the appropriate way of dealing with these situations. Co-ordination will be facilitated by effective procedures of consultation but does not always result from it.

Co-ordination and consultation in respect to public policy are of course easier to achieve when only one jurisdiction is involved and when, in principle at least, activities can be ordered through one hierarchical structure of authority than when, as in a federal system, the participants have legal and constitutional safeguards for their independent positions. Within a hierarchical system authorized channels of communication are usually provided, although other patterns grow up through deliberate design or otherwise. Hierarchy also provides formal procedures by which solutions may be imposed in the absence of agreement, and, as J. A. Corry pointed out many years ago, the very existence of these procedures may

Individual jurisdictions must not only learn to respond effectively to the demands upon them but must also evolve adequate means of central-regional coordination to cope with the circumstances of the interdependence of the two levels.

Such coordination can take two forms:

- co-ordination, the process by which a number of

public activities is ordered according to some set of goals or priorities. Co-ordination raises both the existing

level and the subsequent actions to improve local health care. - consultation, the process by which officials and

public agencies with some significant degree of local independence discuss and consult interdependent communities in

order to reach their respective responsibilities of education and their judgments of the appropriate way of dealing with these

situations. Co-ordination will be facilitated by effective procedures of consultation which does not always result from a

pre-arranged and consultation in respect to public policy and of course another is to ensure that only one policy

direction is followed and when it is multiple in nature, activities can be ordered through an inter-agency agreement or similar

form when, as in a local system, the participants have legal and constitutional authority for their independent positions.

Within a hierarchical system authority remains at the center and is usually exercised through other means such as

through deliberate action by government. Similarly after the other formal objectives of local government may be imposed on

the system of government, and as a last resort may be imposed on the very existence of these procedures may

inhibit "bickering".¹ The relations between the federal and provincial governments cannot of course proceed within a pattern of hierarchical authority. On the surface, it would seem that the processes of joint decision-making which characterize cooperative federalism must lead almost inevitably to delays and frustrations in the framing and implementation of public policy.

Despite the inherent difficulties in working the institutions of cooperative federalism, it is significant that in the past two years a very significant volume of public policy has resulted from the collaborative procedures. Agreements of fundamental importance have been reached in respect to contracting-out, public contributory pensions plans and important aspects of economic direction and control. Important changes appear to be coming in the fields of medical insurance and public assistance. The agreement to set up the Tax Structure Committee was a major achievement in this direction and one can be reasonably optimistic that the Committee will have some measure of success in attaining the ambitious objectives set out in its terms of reference. We are not here arguing that these actual and anticipated policies resulting from the processes of cooperative federalism were the appropriate responses of the governments concerned to the demands upon them. Rather, we would argue that the record indicates that these procedures of joint decision-making have not in the recent past imposed insuperable barriers to the formulation and implementation of public policies of fundamental importance.

...the relations between the Federal and
 provincial governments... of course passed within a
 pattern of hierarchical authority... On the contrary, it would
 seem that the process of joint decision-making which charac-
 terizes cooperative federalism was less almost inevitably
 to delay and frustration in the timing and implementation
 of public policy.

Despite the inherent difficulties in working out
 institutional arrangements for cooperative federalism, it is significant
 that in the past few years a new significance has been
 public policy has emerged from the administrative perspective.
 Elements of functional integration have been revealed in
 respect to constitutional, public administration, economic
 and social aspects of economic development and growth.
 Important changes appear to be taking place in the field of health,
 education and public services. The government is not up to the
 task of providing a new administrative structure in this field.
 It is not clear how the government is to meet the challenge
 with these new demands on resources in achieving the economic
 objectives set out in the annual plan. It is not clear
 whether these new demands are being met by the government
 from the process of cooperative federalism with the provin-
 cial government of the government concerned in the various
 areas. Indeed, it is not clear that the government has
 that these procedures of joint decision-making have not in
 the past been applied in the various sectors of the economy
 and implementation of public policy of functional integration.

Consultative procedures leading to federal-provincial policy co-ordination are extraordinarily subtle and one cannot predict with any assurance the form which the most effective of these procedures will take. What seems reasonably certain, however, is that the establishment of administrative machinery, even though ingenious, will not of itself bring constructive relations about. The following general points can be made:

1. Consultation leading to effective co-ordination will be facilitated when the participants can speak authoritatively for their respective governments. This does not mean that in respect to every matter under discussion these officials involved have received explicit "instructions" from their governments -- such a formal requirement would inhibit effective consultation. What is necessary is that the participants perceive each other as persons closely in touch with the perspectives of their respective administrations and with some degree of influence in determining these perspectives. There is also the requirement, that is probably not completely fulfilled in any of the governments, that there are effective procedures of Cabinet and Treasury control so that programme agencies and programme goals are subordinated to more comprehensive goals. As we saw in Chapter Seven, there has developed a complex pattern of functional relations between counterpart agencies of the two levels and in some circumstances those involved in these relations may resist attempts to subsume their activities under less particularistic

Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

goals. Although the effective articulation of federal and provincial objectives involves these functional interactions being sustained, and in some cases strengthened, effective relations concerning more comprehensive kinds of public policies require further measures of overhead control than have in some jurisdictions been developed.

2. Consultation and co-ordination will be facilitated when the participants come to share as much of a common frame of reference as is compatible with their continuing loyalty to their respective governments. Federal-provincial collaboration in respect to a very large number of specific programmes and projects has been possible largely because those involved were members of the same professions or sub-professions, and, as we have seen, such membership characteristically means not only the common possession of specialized knowledge and techniques but also the commitment to certain public-policy preferences. When matters of more fundamental political and economic choice are at issue it is unreasonable to expect that federal-provincial agreement can be reached in terms of such professional criteria, although agreement on matters of economic policy is more likely than otherwise if the elected and appointed officials involved are relatively sophisticated in the ways of contemporary economic analysis. However, a prolonged period of constructive relationships between the elected and appointed officials of the federal and provincial officials can be expected to result in a kind

of community being developed, a community with its own characteristic perspectives and procedures and with its own subtle ways of distributing status and influence among its members. This development will of course be encouraged if the membership in such a group becomes relatively stable and if there is some movement of personnel among the governments involved. It is obvious of course that the growth of community is dependent upon the politicians of the federal and provincial governments continuing to support such kinds of collaborative behavior.

3. Consultation and minimum levels of co-ordination will be facilitated if the participants are more committed to the substantive results of particular policies than to enhancing the influence of their respective governments. Cooperative federalism requires a high degree of pragmatism, even opportunism, among those officials involved in federal-provincial relations as to what functions each level should perform. Thus any assumption by federal officials that decisions by the central government are somehow inherently "better" or more legitimate than those of the provinces is clearly incompatible with effective federal-provincial collaboration. Conversely, if some or all of the provinces carry out a persistent policy of attempting to extend their range of discretion at the expense of the federal authorities, regardless of the consequences of such actions for particular public responsibilities, the prerequisites of cooperative federalism are

challenged in the most fundamental way. Any effective system of federal-provincial relations must of course deal with circumstances in which the interests of the governments involved conflict and it is only realistic to recognize that these differences characteristically arise from the divergent responsibilities these jurisdictions have assumed rather than from the perversity of the authorities of one level or the other. However, no government can be a constructive collaborator in the enterprise if its overriding objective is to decrease its dependence on the others regardless of the consequences of such actions for the substantive results of public policy.

4. Effective consultation leading to at least limited measures of co-ordination will be facilitated if the participating governments are predisposed to include the objectives of the others within their own priorities. Let us take a simple example. Assume federal-provincial discussions about a proposed measure where result would be to increase municipal borrowing for capital purposes. Assume further that the primary objectives of the federal authorities relate to the income and employment aspect of these expenditures and that the first aim of the provinces is to safeguard the financial solvency of the municipalities. If each government presses its primary aim to the exclusion of the concerns of the other it is likely that these will prove incompatible, to a greater or lesser degree. But let us make more optimistic

assumptions that either before or as a result of inter-governmental consultations (a) the provinces recognize both that the increase in gross demand expected to result from the measure is desirable and that the federal authorities have a legitimate interest in ensuring full employment, (b) the federal government shows a genuine interest in the continuing financial stability of the municipalities and a sympathetic appreciation of provincial concern for this objective. Under such circumstances effective consultation can lead to a solution which includes both federal and provincial aims, a solution agreed upon against a background of mutual respect among the governments concerned for the constitutional responsibilities of the other.

5. Consultation will be facilitated when for the most part they take place within a framework of confidentiality and when both formally and informally the governments come to share with each other information about situations and their appreciation of these situations which is not available to the public. It does not seem necessary to argue that the processes of federal-provincial collaboration and consultation about fundamentals cannot be successful unless to some considerable degree they can take place without publicity until agreements are reached. The sharing of information and views among the officials must be continuous and it is impossible to defend the situation which existed in the past where the federal authorities were prepared to share these more freely with friendly foreign governments than

with provincial administrations. In the present context of federal-provincial relations, however, the federal government appears more sensitive to provincial responsibilities than are at least some of the provinces in respect to matters within their own sphere of constitutional jurisdiction which may have significant implications for federal policies.

In general, the relative success of cooperative federalism in recent years in harmonizing to some tolerable degree the objectives of the federal and provincial governments had depended much more on the attitudes of the officials involved and on the restraints they have placed on their own behavior than on the development of more institutionalized procedures of inter-governmental collaboration. The existing structures are extraordinarily complex and work as well as they do largely because the individuals involved, including both elected and appointed officials, have come to know and respect each other in their increasingly frequent contacts. Whether or not this somewhat personalized fabric of co-operation could survive the dislocation of a rapid displacement of the present personnel is a matter of conjecture.

CIRCUMSTANCES OF SUCCESS II: POLITICAL COMPETITION AND ARTICULATION

The preceding Chapters of this study have analyzed cooperative federalism exclusively as it relates to interactions between the federal and provincial executives. It would, however, be unrealistic in evaluating the possibilities of this variant of federalism being sustained to ignore completely the political context within which these relations

take place, to ignore the circumstance that those whose decisions are overriding in federal-provincial relations are successful politicians who must periodically fight campaigns for re-election and who must continually in their respective legislatures and outside defend their public conduct. There are two difficulties of a broadly political nature in the contemporary variant of cooperative federalism:

First, federal-provincial relations have come increasingly to deal with policy matters of the most fundamental kind -- matters which a democratic community has a disposition to settle by the processes of free and open debate and political competition -- and yet the success of the governments concerned in arriving at tolerable settlements in such situations necessitates a considerable degree of insulation from publicity and from certain varieties of partisan-political pressures.

Second, although the interdependence of federal and provincial officials in their policy-making and policy-executing roles exercises strong influences toward collaborative behavior, there are fewer influences toward cooperation impinging on elected officials in their partisan-political capacities.

The situation involving the so-called Fulton-Favreau formula illustrates one of the kinds of political difficulties which cooperative federalism may face. From the time that discussions between the federal and provincial governments in respect to an amending procedure were reactivated by the then Minister of Justice, the Honourable E. Davis Fulton, until

the publication of the draft formula upon which all the governments had agreed in the summer of 1964 there was little public debate on the issue even among specialists in constitutional matters and it was impossible for those outside government to know except in a general way what was going on.² Between the time the draft formula was agreed upon and the spring of 1965 the projected amendment was approved by the legislatures of all the provinces except Quebec without causing the incumbent provincial administrations significant political difficulties. However, by this time considerable opposition to the Fulton-Favreau formula had been aroused -- opposition from members of the Progressive-Conservative and New Democratic parties in the House of Commons, from the Union Nationale and several influential private groups in Quebec and from both French and English-speaking specialists in constitutional matters. The federal and Quebec governments thus faced a difficult situation. They had been precluded because of the relative confidentiality of the discussions preceding the agreement from cultivating public support for the new procedure. The matter at hand was a complex one and the draft formula was the result of a complicated compromise among the governments involved and yet many of the critics of the draft formula put their arguments in terms of broad and easily understandable considerations quite unrelated to the acceptability of their proposals to the eleven governments. Despite these difficulties, the failure of either or both of the administrations to press the issue to legislative approval

would place on them the onus for delaying the enactment of a Canadian amending procedure which had been under discussion for nearly forty years and might possibly complicate their relations with the administrations which had secured the assent of their legislatures. It is likely that similar situations will arise in the future: fundamental policy discussions carried on in confidence between the federal and provincial governments and culminating in an agreement which is the subject of vigorous debate largely precluded up until that time. Neither the members of the opposition parties nor the other members of politically influential publics have apparently fully accepted the legitimacy of high policy being made by federal-provincial agreement and because of this the policies devised by these procedures may be subjected to more severe criticism -- and criticism somewhat harder for their supporters to answer -- than if they were made by a single jurisdiction.

The relationships between federal and provincial political parties and the impact of these relations on the stands on public issues that these parties take are extraordinarily complex and have never been systematically examined.³ In some cases the electoral success of a federal or provincial party is significantly aided or frustrated by actions of the party of the same name at the other level and yet in other circumstances there may be little interdependence. Partisan-political interactions between Members of Parliament and members of the same parties in the provincial legislatures

are conditioned by this kind of factor, by financial and other relationships between federal and provincial party organizations, by antagonisms and friendships growing out of previous political experience and other influences. In most cases, however, it would appear that successful federal and provincial parties have resources of funds, organizations and popular support independent of party fortunes at the other level, and it seems usually to happen that only very weak parties are effectively subordinated to their electorally more successful federal or provincial counterparts. In circumstances where the federal government and that of a province bear the same party label there is thus no assurance that their relations will be harmonious, and Canadian political history has many contrary examples. On the other hand, where federal and provincial parties in power are of different complexions there are no overriding partisan-political inhibitions imposed on collaboration in policy matters where mutual interests make this appropriate. In general, however, the influences on the federal and provincial administrations to collaborate because of their mutual interdependence in policy matters have little counterpart in the partisan-political system.

CONDITIONS OF SUCCESS. III: THE LEGITIMATION OF COOPERATIVE. FEDERALISM

If cooperative federalism is in the long run to survive there must somehow be generated among the politically influential

publics in Canada the belief that this is a legitimate way of making crucial public decisions. In the face of alternative proposals for reforming our federal institutions, proposals which are on the surface simpler and more conceptually consistent, this legitimation will be extraordinarily difficult to bring about. These difficulties inherent in the complexities of the existing procedures and institutions are compounded by the incompatibility between cooperative federalism and at least three influential systems of ideas about how government in Canada should be carried on.

First, cooperative federalism is difficult to defend in terms of British parliamentary traditions. The underlying assumption of this tradition is that the legislature is sovereign, in the United Kingdom over all matters and in federal countries over all those matters conferred on it by the constitution. When, however, the actual focus of decision is transferred from the Cabinet collectively responsible to the elected chamber to intergovernmental bodies the underlying assumption is challenged. Cooperative federalism has been called by one student of the Canadian constitution "government by diplomacy", and contemporary democratic theory and practice, both where British parliamentary traditions prevail and elsewhere, has found it extraordinarily difficult to deal with situations involving the external relations of governments.

Second, cooperative federalism in its symbolic aspects gives Quebec no special status in the Canadian federal system. Mr. Daniel Johnson has said of this system:

"Au lieu d'une véritable constitution, nous avons un régime mouvant, qui est constamment en mutation et qui est le produit des accords formels ou tacites entre Ottawa et la majorité des provinces. L'autorité suprême du pays c'est une institution qui n'est même pas mentionnée dans l'Acte de l'Amérique britannique du Nord. C'est le forum des conférences fédérales-provinciales. Et là, le Québec n'a pas plus de droits que Terre-Neuve."

The Honourable Jean-Luc Pépin in the most systematic defence of cooperative federalism that has ever been made⁵ has argued that this alternative recognizes both "cette réalité socio-politique du binationalisme " and "un statut particulier" for Quebec in the Canadian federal system. However, in the formal aspects of federal-provincial relations and in the strict adherence to the rule that the various contracting-out options are available to all the provinces the symbol if not the substance of the equality of the provinces is upheld.

Third, cooperative federalism to be successful requires a degree of secrecy in decision-making which is believed by many to be incompatible with the requirements of democracy. Members of the working press have become increasingly restive with the confidentiality and many have suggested that the conferences of Prime Ministers and Premiers be held in public. The necessity for secrecy until the results of federal-provincial negotiations are concluded can be expected to inhibit the legitimation of cooperative federalism.

COOPERATIVE FEDERALISM AND CONSTITUTIONAL CHANGE.

Those who wish changes in the Canadian federal system can be divided into two groups -- those who press for such

reforms to come through the ongoing processes of federal-provincial collaboration and those bent on explicit alterations in the text of the existing constitution. The debate between those belonging to these groups is not easily joined. Persons who are convinced that a substantial rewriting of the constitution is necessary often appear to place a high value on clarity and explicitness in our governmental arrangements and on the symbolic significance of a constitution as embodying the fundamental moral and political principles on which the regime is founded. By these tests, cooperative federalism is of course deficient. On the other hand, supporters of a new constitution have not, so far as we are able to discover, made a careful study of the traditions and institutions of Canadian federalism as they have evolved in the past five years or of the possibilities that some or most of the objectives they seek could be attained through the ongoing processes of federal-provincial interaction. But proponents of cooperative federalism have not investigated in any detail the incidence of formal constitutional arrangements on these institutions or the constraints that these arrangements impose on the attainment of particular substantive objectives.

Our evaluation of the relative appropriateness of the two broad alternatives as procedures of constitutional evolution will proceed in terms of answers to three questions:

- if we assume that changes will require the agreement of the federal government and those of most if not all of

the provinces, is it more likely that such agreement will be secured for explicit constitutional change than for adaptation through federal collaboration on particular public policy matters?

- can the relations between the federal and provincial governments be more appropriately regulated through interactions between the federal and provincial executive than through other procedures?

- is it appropriate to amend the constitution to provide explicitly for the institutions and procedures of federal-provincial relations?

1. THE NECESSITY FOR FEDERAL-PROVINCIAL AGREEMENT.

So far as we are able to discover, those who wish the Canadian constitution to be rewritten have never seriously considered whether or not it is likely that politically influential elements in the country could be brought to agreement on this matter. This applies to supporters in Quebec of the associated states solution, to Peter J. T. O'Hearn⁶ and to Marcel Faribeault and Robert M. Fowler⁷ who have presented detailed draft constitutions and to those persons who have called for a new constitution without suggesting what they believe its nature should be. It appears unlikely that the required measure of agreement could be secured in the near future. The political relations between the "two founding races" are in a critical and fluid state. The institutions and procedures of federal-provincial relations

are evolving rapidly. We would therefore agree with one scholar who remarked "to try to redraft the Canadian constitution now would be the same as trying to write a peace treaty while a war was still on". It is possible, however, to foresee limited changes in the constitution. One could imagine agreement to rewrite the document limited to dropping its obsolete sections and improving its literary qualities. Perhaps progress could be made toward a constitutional bill of rights binding on all governments and not subject to unilateral amendment by any. It may be possible to find consensus on more adequate protection for French and English-speaking cultural minorities. On the other hand, any attempt to rewrite the constitution so as to change in a fundamental way the division of legislative powers between Parliament and the provinces would require simultaneous federal-provincial agreement on a very wide range of basic political issues. It seems to us unlikely that such a consensus will emerge in the immediate future.

The ongoing processes of co-operative federalism allow politicians and civil servants to search for agreement where it can be found. We have argued in the last Chapter that the current circumstances of federal-provincial interdependence make necessary effective measures of inter-governmental collaboration in respect to fairly fundamental policy alternatives. On the other hand, a federal-provincial conference, unlike a constitutional convention, deals with

specific proposals for action and does not have to strive for agreement on matters of abstract definition or on how to deal with hypothetical situations which may arise in the future. In the crucial area of the direction and control of the Canadian economy Jacques Parizeau has advanced a persuasive argument which is applicable to an even broader range of problems facing the Canadian federal system:

"(can we) conclude....that changes in the Constitution are likely to help the organization of adequate and co-ordinated economic policies? Personally, I doubt this very much. On the contrary, the Constitution as it stands now has helped to narrow the areas of conflict. To attempt, in present circumstances, a full revision or redrafting of the Constitution means really that the whole front will be ablaze; any rational solution to urgent problems of economic policies might have to be postponed for a long time. It would seem much more fruitful to find first an empirical equilibrium between the parties and then draft it into a legal text."8

2. "EXECUTIVE" FEDERALISM AND OTHER ALTERNATIVES FOR REGULATING FEDERAL-PROVINCIAL RELATIONS.

There are two alternatives to cooperative federalism in regulating the relations between the federal and provincial governments. The first is that the judiciary should assume a more active role in delineating the respective powers, privileges and responsibilities of the two levels. This appears in the light of recent experience in Canada and other developed federations to be unrealistic. Judicial interpretation of the constitution is almost inevitably sporadic and the predilection of the courts is to emphasize the exclusive jurisdiction of central and regional governments rather than the articulation

of their activities. Furthermore, in Canada at least, many of the more important problems of federal-provincial relations, particularly as these concern fiscal matters and the direction and control of the economy, do not seem appropriate for judicial determination. The second alternative is to vest in some group or groups other than the courts with some degree of independence of both levels the tasks of making some of the most important decisions in Canadian federalism. The Rowell-Sirois Report recommended "the establishment of a permanent and independent Commission to advise the federal government on the payment of National Adjustment Grants to the provinces and to reappraise each five years the criteria according to which such subsidies were paid". This recommendation received little support at the time it was made and has since been regarded as one of the Commission's less constructive suggestions. In his recent book proposing a new Canadian constitution Peter J. T. O'Hearn suggests a "Federal Council" which, according to his draft constitution:

"shall consist of Delegates of the Government in Canada. Each Provincial Government shall appoint one Delegate and the Government of Canada shall appoint Delegates not exceeding in number the Provincial Delegates. The Chairman shall be elected from the Delegates of the Government of Canada and the Council shall meet at the Call of the Chairman or any Five Delegates. The Council may make a binding Allocation between the Government of Canada, on the one Hand, and the Governments of the Provinces, on the other Hand, for any Period not exceeding Ten Years, of the Powers to tax and borrow, and may determine the limits of Rates or Amounts that shall apply to the Allocation; but to do so a Majority of the Delegates of the Provincial Governments representing a Majority of the Population of Canada, according to the latest general Census, must concur." 9

It is significant that O'Hearn's proposal would permit such a "binding allocation" of taxation and borrowing powers to be imposed on any or all of the provinces without their consent provided that the federal government and the requisite number of other provinces agreed. This condition alone would appear to make the proposal unrealistic. In general, the past history and present circumstances of Canadian federalism make it very unlikely that the federal government and the provinces will choose to have their relations regulated in fundamental ways either by the courts or by independent executive agencies explicitly charged with these responsibilities. Neither do we see any important advantages to their doing so.

3. THE CONSTITUTIONAL RECOGNITION OF COOPERATIVE FEDERALISM.

Is it appropriate to redraft the constitution to provide for the institutions and procedures of cooperative federalism? The draft constitution suggested by Marcel Faribeault and Robert M. Fowler provides for three federal-provincial agencies--an Economic Development Bank, a fiscal commission and an Economic and Social Council.¹⁰ Under the proposed constitution each of these bodies would be composed of four members appointed by the federal government and two each appointed by Quebec, Ontario, the four western provinces and the Atlantic provinces. The Economic and Social Council would be an information-gathering agency to transmit to all jurisdictions materials on "the general trend of the Canadian economy, its medium and long-term prospects, its productivity, and the rate of growth,

as well as on the comparative growth of the several Canadian provinces, the improvement of the standard of living in their several regions and the general betterment of social relations in Canada". The Economic Development Bank is to aid in the development of depressed regions, to remedy serious and unforeseen economic disturbances in particular provinces and to "aid in the execution" of important interprovincial projects. The major tasks assigned to the fiscal commission were to advise the governments concerned in their taxing and spending policies. The "statutes, regulations and by-laws" of the latter two groups are to be determined, according to the draft constitution, by "protocol between the federal government and the provinces by a three-fourth majority of the latter".

Faribeault and Fowler nowhere demonstrate that the institutions and procedures they suggest would be preferable to the ones which are now in process of evolution. There is no evidence given, for example, that the proposed Social and Economic Council would proceed more effectively than the present Economic Council of Canada in its rapidly developing pattern of relations with counterpart agencies in the provinces. Would the "fiscal commission" be more adequate in the devising of implementing of rational taxation and spending policies than the institutions which are now developing? Would the proposed federal-provincial bodies work under the direction of the increasing frequent meetings of Premiers and Prime Ministers? Such matters appear to

have been ignored. Responsible proposals for reform in federal-provincial relations must of necessity be based on a careful assessment of the adequacy or otherwise of existing patterns of interaction. There is no evidence that Faribeault and Fowler have done this.

It would seem prudent to try to rewrite the Canadian constitution only after the limits of adjustment possible through the procedures and institutions of cooperative federalism have clearly been reached. As we shall see in the last pages of this study there is some evidence early in 1966 that these limits are being approached.

COOPERATIVE FEDERALISM: THE LIMITS OF ADJUSTMENT

In its legal-constitutional, political and administrative dimensions Canadian federalism has since 1867 demonstrated great resources of adaptability. The major procedures of adaptation in the post-war period have come to be the ongoing processes of federal-provincial executive interaction rather than constitutional amendment or changing patterns of judicial review. In the past ten years through these interactions the dominance of the federal government established during the Second World War has been attenuated by the effective re-assertion of provincial vigor and purpose. Is there then the danger that by piecemeal attrition the influence of the federal government so far as all of part or the country is concerned will be so weakened that Canadian federalism in any recognizable form ceases to exist? For the reasons presented

in the concluding pages of this study, we believe this danger to be "clear and present".

The first kind of hazard to the Canadian federal system in the ongoing procedures of cooperative federalism is that the pressures for autonomy from all the provinces, or at least the larger and more prosperous ones, will so weaken the federal government that it ceases to be able to discharge its responsibilities for the integration and development of the Canadian economy, for economic stabilization and growth and for inter-regional and inter-personal equalization. There are strong forces toward the enhanced power of the provinces. Barring rapid increases in defence spending, the proportion of total public expenditures made by the provinces and local authorities is likely to continue to increase. The new and more specific kinds of social and economic policies which now seem to be necessary make less feasible than before certain kinds of federal control in respect to these matters. The provinces are likely to continue to attract able and purposeful people to their public services. In the House of Commons elected in November 1965 the under-representation of certain provinces in the government party and Cabinet may be expected to work in the direction of making the governments of these provinces the most effective outlet for their distinctive sentiments and interests. Despite these influences, there are strong countervailing forces at work, at least in the governments of the provinces other than Quebec if not the general public in English-Canada, to restrain the further

weakening of federal power. In the last six months several of the Premiers have expressed their anxiety about this trend very explicitly and the government of Ontario has been particularly sensitive to these considerations. None of the other provinces has shown any desire to take advantage of the contracting-out option and none has been willing to cooperate with Quebec on a permanent basis to weaken federal influence. It appears too that all of these provinces are actively seeking increased federal financial assistance for particular functions, specifically higher education and health services. In general, it seems likely that as the pressures of the Quebec government for autonomy are pressed more aggressively and as the implications of the "statut particulier" alternative become more apparent the support of the other provincial administrations for the federal power will increase. Up until recently the ongoing procedures of cooperative federalism have avoided two kinds of situation either of which might have subjected the federal system to almost intolerable strains, the semi-permanent isolation of Quebec from the other provinces on a large number of issues or, conversely, a stable provincial united front against the federal authorities. It appears likely that these circumstances are coming to an end.

The second order of danger, and the one we believe more immediate, is that through cooperative federalism a situation will result in which the political and constitutional relationships between the people of Quebec and those of the other provinces will be so tenuous and so fragmentary -

and so much mediated through the government of Quebec rather than being carried on within the institutions of the federal government - that a constitutional revolution destroying Canadian federalism will have been effected. The Lesage administration when it came to power and for some time afterward asserted the traditional Quebec position that it was demanding for itself only what under the constitution belonged equally to all the provinces; Mr. Lesage's defence of the Fulton-Favreau formula was largely on the grounds that any procedure for amendment acceptable to Quebec must provide for unanimous provincial consent in respect to changes in the most fundamental aspects of the constitution. The existing constitutional system, however, makes possible a very considerable amount of de facto differentiation between the position of Quebec and those of the other provinces and the incumbent provincial government has exploited these possibilities in a sophisticated and successful way. In recent months the official position of the Quebec leadership has apparently reversed the traditional position of the equality of all the provinces and embraced the doctrine of the "statut particulier". The Honourable Paul Gérin Lajoie at his Convocation Address to Carleton University in April 1965 gave advance notice of the new position by questioning in somewhat hypothetical terms the traditional viewpoint that in a constitutional sense Quebec was a province "comme les autres".¹¹ In his speech to the Ste-Foy Chamber of Commerce on December 14, 1965, Prime Minister

Lesage committed his government to the "statut particulier" alternative in the most explicit way.¹²

The acceptance by the government of Quebec to a special status for that province is much more than a post hoc justification of the contracting-out arrangements which have already been implemented, and there are many indications that the province will continue to press aggressively both to increase its range of autonomy and its influence over decisions within the legislative jurisdiction of the federal authorities. In his Labour Day address in 1965 Mr. Lesage asserted that as his government came to formulate more far-reaching and explicit plans in respect to manpower and employment it would press for modifications of federal activities in these fields and more particularly those of the National Employment Service.¹³ The new social security policy whose broad outlines were announced by the Honourable René Lévesque in November 1965 appear to include a provincial system of family allowances based on very different principles than those of the federal scheme in operation for the past two decades;¹⁴ although there have not been, so far as we can discover, any official pronouncements in respect to federal Old Age Security payments several of the same considerations could be advanced to oust the federal government from this programme. It seems likely that as Quebec's plans for regional development are more explicitly formulated and put into operation there will be aggressive efforts to bring federal developmental policies implemented through the Department of Industry, A.R.D.A.

and perhaps other agencies into harmony with provincial requirements. Although so far as the provincial government is concerned, the assertion of the "personnalité internationale" of Quebec has been almost exclusively in the context of educational and cultural affairs, the logic of this position is that without federal involvement the province should be able to make international agreements in respect to all matters within its sphere of legislative jurisdiction and should share with the federal government the responsibilities in international matters where the legislative power to implement obligations is divided between the two levels. The objectives of the Quebec government in respect to the steel complex, the newly-created public sector of the mining industry and other aspects of economic development imply a higher degree of provincial influence than now prevails in respect to federal trade, monetary and transportation policies. The newly-announced plans of the Quebec government to rationalize agriculture can be expected to have important consequences for existing federal activities in these matters. New efforts are in the making to increase the provinces' range of fiscal autonomy. The Minister of Health on December 14, 1965, predicted that the extension of contracting-out would soon give Quebec 50 per cent of corporate income taxes and 75 per cent of the tax on personal incomes;¹⁵ Mr. Kierans is reported to have informed the federal-provincial conference of finance ministers the same month that Quebec would find contracting-out applied to new programmes unacceptable because such transfers of fiscal

equivalents were conditional upon the provinces making expenditures on the same facility or function.¹⁶ More aggressive and comprehensive Quebec plans in respect to such matters as housing, cultural development or immigration would lead almost inevitably to pressures either to displace the federal authorities in these fields or to bring their activities into harmony with provincial objectives. On December 22 Mr. Lesage announced the creation of a committee under the chairmanship of Mr. Jacques Parizeau to study and report by the end of 1966 on the activities of certain classes of financial institutions and appropriate provincial legislation which might be implemented to regulate them; such legislation would be directly contrary to the recommendations of the federal Royal Commission on Banking and Commerce to the effect that Parliament should move to bring "near-banks" under federal jurisdiction.

The creation of a special status for Quebec has implications of the most fundamental kind for the workings of the institutions of the federal government. If the present trends continue, Parliament will come increasingly to deal with matters in respect to which Quebec has assumed the exclusive responsibilities so far as the residents of that province are concerned. Increasingly, important federal departments and agencies which deal with matters of crucial concern elsewhere in Canada will have only a tangential relationship to the people and government of Quebec. Increasingly, federal

elections will revolve about matters which have a direct relevance only outside that province. We would expect such a situation to give rise to new tensions between Quebec and the rest of Canada, and it does seem to us unlikely that English-Canada will accede simultaneously to pressures for a special status for Quebec and for a more influential role for French-speaking citizens from that province in the institutions of the federal government. There are conceivable changes which might be made in the structure and workings of federal institutions to accommodate the situation of a "statut particulier". Mr. Paul Sauriol has recently envisaged a group of reforms in which the normal traditions of parliamentary government would prevail in respect to matters within the exclusive jurisdiction of the federal authorities while in "les domaines mixtes" the responsibilities would be assumed either by a reconstituted Senate or some federal-provincial body to which each level would delegate its powers in these affairs.¹⁷ It seems unlikely, however, that such a solution could harmonize the differing conceptions of Quebec and the rest of the country in respect to the appropriate role of the federal government.

The establishment of a "statut particulier" for Quebec within the Canadian constitutional system has important implications for the organizational relations between English- and French-speaking Canadians outside the governmental sphere. The theory and practice of the constitutional "statut particulier" means that the most important political relations between the two cultural communities are conducted by their

respective leaders "at the summit." It is inherent in such a situation that this pattern of political relations will sustain and be sustained by corresponding kinds of interactions among private and quasi-public associations, particularly those whose major concerns are with public policy matters. In general terms, a special status for Quebec makes less possible the establishment of effective bicultural organizations on a country-wide basis than a situation in which all the provinces perform broadly the same responsibilities. During the period when the division of functions between the two levels of government are matters of controversy, organizations including important elements from the two cultural communities are subjected to severe internal strains when French-Canadians from Quebec wish their province to have the exclusive powers to deal with affairs which other Canadians see as appropriate objectives of federal action. As particular aspects of the "statut particulier" are implemented, associations dealing with such vital concerns of public policy as higher education, welfare and health services, the exploitation and conservation of natural resources, municipal government, manpower and collective bargaining and so on can be expected to organize themselves into autonomous or semi-autonomous Quebec and non-Quebec elements. It is possible and even probable that the organizations will carry on some kind of formal relationships but these relations will be almost of necessity of a "fraternal" variety, precisely because their major focuses of attention are on different governments. It is to be expected also that

these associations will be almost exclusively unicultural in both form and spirit and that English-speaking Canadians from Quebec and French-speaking Canadians outside that province will find them inadequate vehicles for expressing their particular sentiments and interests.

The situation as it is evolving thus contains these elements.

First, so far as the provinces other than Quebec are concerned, the pressures toward autonomy which began in the late 1950s seem for the time being to have run their course and among these administrations there is apprehension about the further weakening of federal power.

Second, Quebec continues to press her demands both for a wider range of autonomy and an enhanced degree of influence for the provincial government in matters within the legislative jurisdiction of the federal authorities.

Third, as the de facto differentiation between the position of Quebec and those of the other provinces increases in scope and importance there are revealed deep incompatibilities between federalism and the normal workings of federal parliamentary institutions and between the "statut particulier" situation and influences to enhance the influence of French-speaking Canadians from Quebec in the institutions of the federal government.

Can the ongoing procedures of federal-provincial interaction enable the Canadian constitutional system to adapt to the new and contradictory demands now being made upon it?

This seems unlikely. The directions in which the system is now being taken involves a constitutional revolution, there is nothing in the Confederation settlement as it was consummated in 1864-'67 and as it subsequently evolved which provides for a "statut particulier" in the form and dimensions clearly contemplated by the government of Quebec. It seems improbable that change of such a fundamental nature can be effected through the ongoing procedures of piecemeal federal-provincial negotiation. It is thus reasonable to expect that because Quebec has now charted its course in such explicit terms its specific demands will come to be evaluated by the federal government and those of the other provinces within the framework of broader considerations than has been true in the recent past. The institutions and procedures of cooperative federalism have shown some capacity to deal with questions of ever-increasing generality. As we saw in Chapter Seven, federal-provincial relations in the period after the Second World War were dominated by considerations relating to specific programmes and facilities. More recently progress has been made in respect to broader functions of government. The Tax Structure Committee has been charged with questions related to the most fundamental aspects of federal and provincial policies and more particularly with attempting to find agreement on broad expenditure-priorities. Even if there is continued success in these directions, it seems improbable that the federal and provincial executives will be able by agreement to effect a revolution by which the constitutional ties between Quebec and the rest of Canada are of a quasi-diplomatic rather than a federal variety.

In spite of the analysis given above, we believe that it would be imprudent to take a deterministic view of the current crisis in the Canadian federal system. On the one hand, it is unreasonable to take comfort, as some have done, in what one might call the "pendulum theory of federal and provincial powers" which asserts that there are somehow inherent forces at work which will as in the past prevent the attenuation of the powers of one level or the other to the extent that federalism is destroyed. There are of course conceivable circumstances which would in the foreseeable future lead to the effective reassertion of federal power so far as the government and people of Quebec are concerned. The partial or complete mobilization of the country in response to a deteriorating international situation would of course bring this about. It is possible to imagine a situation where politically influential groups throughout Canada come to believe that in terms of economic stability and growth an unduly high price was being paid by the decentralized variant of Canadian federalism which had developed. Or some new federal political leadership might emerge which would successfully commit the country to a bold and popular programme of reform even in the face of the opposition of the government of Quebec and perhaps those of some of the other provinces. It is impossible to predict the likelihood of these circumstances occurring, but it is unreasonable to believe it inevitable that any or all of them will. On the other hand, it seems that the Canadian federalism has not yet gone past the point of no return. It is possible

that the Quebec leadership will press its demands toward the "statut particulier" less aggressively than a reading of recent official pronouncements would lead one to believe. Fortunately, viable political arrangements do not need to conform to standards of logical consistency and it is possible that Canadians may be able to agree on a set of devices which allow each of the contradictory demands now being made on the Canadian constitutional system to be met in part. Perhaps some new distribution of revenues, revenue sources and functional responsibilities can be effected which would provide both for the dominance of the federal government on matters of economic integration and development and exclusive provincial responsibility in matters of provincial concern without the existing extent of federal involvement in affairs within the legislative jurisdiction of the provinces; such a development would go some direction in ensuring the historic role of the federal government on economic matters and mitigating the difficulties inherent in a special status for Quebec within the Canadian federal system. Perhaps too the consideration of the demands of the government of Quebec in respect to particular matters will come to take place within a framework of discussion which takes into account the cumulative impact of these demands for autonomy on the continuing survival of Canadian federalism. It is this last alternative rather than the piecemeal adjustments of cooperative federalism which gives best hope for the immediate future.

NOTES

1. Difficulties of Divided Jurisdiction. A Study Prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, 1940, p. 10.
2. Mr. Fulton did, however, submit the draft proposals to a selected group of university law teachers for their comments.
3. For one of the few systematic attempts in this direction see Edwin R. Black, "Federal Strains within a Canadian Party" 45 Dalhousie Review (1965), pp. 307-323
4. Egalité ou Indépendance, Montréal, 1965, p. 73
5. "Le Fédéralisme coopératif" dans Le Canada Face à L'Avenir, Conférence annuelle de l'Institut Canadien des Affaires Publiques, 1964, Montréal, 1964, pp. 113-124.
6. Peace, Order and Good Government, Toronto, 1964.
7. Ten to One: The Confederation Wager, Toronto, 1965.
8. "Prospects for Economic Policy in a Federal Canada" in The Future of Canadian Federalism edited by P.-A. Crépeau and C.B. Macpherson, Toronto, 1965, p. 57.
9. Ibid. p. 45
10. Ibid. pp. 145-148
11. Quebec Department of Education, Information Service (mimeo.) "Up to the present, Quebec has asked nothing for itself which it would be unwilling to recognize for the other provinces. But one may wonder if this is the correct attitude to take? (p. 5) and "What objection or difficulty would there be if Canada were to adopt a constitutional regime which would take account of the existence of two 'nations' or 'societies' within the one Canada?" (p. 7).
12. Reprinted in Le Devoir, 23 décembre and 24 décembre.
13. Le Devoir, 3 septembre.
14. Interview to Le Devoir, 20 novembre.
15. Le Devoir, 14 décembre.
16. Le Devoir, 15 décembre.
17. Editorial Le Devoir, 17 décembre 1965.



MEMORANDUM

CLASSIFICATION

TO
A

TOUS CEUX QUI ONT EN MAIN LE
RAPPORT DE DONALD SMILEY

YOUR FILE No.
Votre dossier

OUR FILE No.
Notre dossier

DATE

le 23 mars 1966

FROM
De

Claude Desjardins

SUBJECT
Sujet

Rapport de recherches - Donald Smiley

Vous trouverez ci-joint un annexe au rapport de recherches préparé par le Professeur Donald V. Smiley de l'Université de la Colombie Britannique.

Ce deuxième document de l'étude de Donald Smiley consiste en une revision du chapitre No.8, faisant déjà partie du texte original de cette étude. Ce rapport "annexe" est relié comme tout autre document afin de rendre son identification plus facile.

